

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Dec 07, 2023**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE R. STILL,

Defendant.

NO: 2:22-CR-00074-RMP

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

BEFORE THE COURT is Defendant Jesse R. Still's Motion to Dismiss, ECF No. 42. The Government opposed in its response, ECF No. 47, and Defendant replied, ECF No. 49. Defendant is charged with Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1), 924(a)(2). ECF No. 1. Defendant seeks to dismiss these charges, challenging the constitutionality of 18 U.S.C. § 922(g)(1) both facially and as applied to him.

The Court heard oral argument on the motion on December 5, 2023. Defendant, who is not in custody, was present and represented by Assistant Federal Defender Molly Winston. Assistant United States Attorney David Herzog appeared

1 on behalf of the Government. The Court heard arguments by counsel. Having  
2 reviewed the parties' filings and exhibits, heard the argument presented at the  
3 hearing, and reviewed the relevant law, the Court is fully informed.

#### 4 **BACKGROUND**

5 In 2014, Defendant was convicted in an Oregon state court of Unlawful  
6 Possession of Methamphetamine and Fleeing or Attempting to Elude a Police  
7 Officer While in a Motor Vehicle. ECF Nos. 42-1 and 42-4. For each conviction,  
8 Defendant was sentenced to Supervised Probation for 18 months and 15 days in jail.  
9 *Id.* In 2018, Defendant was convicted in an Idaho state court of Unlawful  
10 Possession by Convicted Felon. ECF No. 42-7. The 2014 Oregon convictions,  
11 which were felonies, served as the predicate felony offenses for the 2018 Idaho  
12 felony conviction. ECF No. 42 at 3. On June 22, 2022, Defendant was indicted in  
13 the present case for being a Felon in Possession of a Firearm, in violation of 18  
14 U.S.C. § 922(g)(1), 924(a)(2). ECF No. 1. On October 28, 2022, Defendant  
15 successfully reduced his 2014 Oregon felony convictions to misdemeanors. *See*  
16 ECF Nos. 42-3 and 42-6. Defendant now seeks to dismiss the current charge of  
17 Felon in Possession, arguing that 18 U.S.C. § 922(g)(1) is unconstitutional both  
18 facially and as applied to Defendant due to his criminal history. ECF No. 42 at 12–  
19 14.

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## LEGAL STANDARD

The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. In 2008, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms. *District of Columbia v. Heller*, 554 US. 570 (2008). However, the Supreme Court noted that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. Additionally, the Court stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . .” *Id.*

In 2010, the Ninth Circuit in *United States v. Vongxay* held that “922(g)(1) does not violate the Second Amendment as it applies to Vongxay, a convicted felon.” 594 F.3d 1111, 1118 (9th Cir. 2010). The Court stated that “felons are categorically different from the individuals who have a fundamental right to bear arms.” *Id.* at 1115. In 2022, the Supreme Court articulated a new test for firearm regulations:

In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

1 *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (quoting  
2 *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 50 n.10 (1961)). *Bruen* did not  
3 explicitly address felon in possession statutes, but it refers to those falling under  
4 the protection of the Second Amendment as “law-abiding” people. *See, e.g.*,  
5 *Bruen*, 142 S. Ct. at 2133. The opinion states that “nothing in our analysis should  
6 be interpreted to suggest the unconstitutionality” of licensing regimes that “ensure  
7 that only those bearing arms in the jurisdiction are, in fact, ‘law abiding,  
8 responsible citizens.’” *Id.* at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

9 To the best of this Court’s knowledge, since *Bruen* no court in the Ninth  
10 Circuit has held that § 922(g)(1) violates the Second Amendment, either facially or  
11 as applied. The many courts facing similar motions to dismiss have  
12 overwhelmingly rejected such challenges, finding that *Bruen* did not overrule  
13 existing precedent, such as *Vongxay*, and upholding § 922(g)(1). *See, e.g., United*  
14 *States v. Hill*, 629 F. Supp. 3d 1027, 1030 (S.D. Cal. 2022) (finding that *Bruen* did  
15 not “effectively overrule” *Vongxay* and denying a similar motion to dismiss).

16 Courts that analyze whether prohibiting felons from possessing firearms is  
17 “consistent with the Nation’s historical tradition of firearm regulation” have found  
18 that “there is historical context for treating felons differently when it comes to  
19 firearm ownership.” *See, e.g., United States v. Villalobos*, No. 3:19-CR-00040,  
20 2023 WL 3044770, at \*7 (D. Idaho, Apr. 21, 2023) (“In fact, the Court cannot  
21

1 locate a single decision where a court found this Nation’s history and traditions  
2 would allow felons to possess firearms.”).

### 3 DISCUSSION

4 Defendant challenges his charge on both facial and as applied grounds. ECF  
5 No. 42 at 7. The Court will address both in turn.

#### 6 Facial Challenge

7 Defendant relies on *Bruen* to argue that the government must justify its  
8 regulations of firearms by demonstrating that the regulation is consistent with the  
9 “Nation’s historical tradition of firearm regulation.” ECF No. 42 at 8–9. Defendant  
10 further relies on *Range v. Attorney General United States of America*, 69 F.4th 96  
11 (3d Cir. 2023), in which the Third Circuit upheld an as applied challenge to §  
12 922(g)(1) in the face of *Bruen*. ECF No. 42 at 9. Defendant argues that the Third  
13 Circuit correctly held that the defendant was among “the people” protected by the  
14 Second Amendment, despite having a state felony conviction of an offense  
15 punishable by up to five years of imprisonment. *Id.* at 10. The Third Circuit found  
16 that § 922(g)(1) regulated Second Amendment conduct, and that the burden  
17 therefore shifted to the Government to justify the regulation. *Id.* The court then  
18 found that the Government failed to adequately justify the regulation by showing  
19 that it is consistent with the “Nation’s historical tradition of firearm regulation,” and  
20 held that § 922(g)(1) was unconstitutional as applied to the defendant. *Id.*

1 Defendant cites four unreported, district court decisions from outside this circuit that  
2 have followed *Range* to argue that this Court similarly should follow *Range*. *Id.*

3 Defendant further points to *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), in  
4 which the Ninth Circuit stated that “*Bruen* abrogated the two-step approach”  
5 previously adopted to analyze Second Amendment challenges. ECF No. 42 at 12.  
6 Defendant relies on *Teter* to argue that *Vongxay* has been “invalidated” by *Bruen*.  
7 *Id.*

8 In response, the Government argues that Section 922(g)(1) remains good law,  
9 and that, rather than overruling precedent, *Bruen* supports the existing precedent  
10 upholding Section 922(g)(1). ECF No. 47 at 11–12. The Government points to  
11 *United States v. Robinson*, No. 2:22-CR-212-TL, 2023 WL 5634712 \*at 5 (W.D.  
12 Wash. Aug. 31, 2023), where the Western District of Washington concluded that  
13 *Vonxgay* is still good law and not irreconcilable with *Bruen*. *Id.* at 15–16. The  
14 Government further argues that many courts have addressed challenges to this  
15 statute due to the recent *Bruen* decision by the Supreme Court, and none has found §  
16 922(g)(1) is facially unconstitutional based on *Bruen*. *Id.* at 19. Even if *Bruen* did  
17 overrule Ninth Circuit precedent, the Government argues that historical evidence  
18 supports the constitutionality of this statute. *Id.* at 24.

19 The Court finds that overwhelming Ninth Circuit caselaw supports upholding  
20 facial challenges to Section 922(g)(1). The single Ninth Circuit case cited by  
21 Defendant in support of overruling existing Ninth Circuit precedent is *Teter*, which

1 addressed not § 922(g)(1), but “butterfly knives.” *See* 76 F.4th at 942. All other  
2 cases cited by Defendant are outside of this circuit and inconsistent with existing  
3 Ninth Circuit caselaw. Therefore, the Court denies Defendant’s Motion to Dismiss  
4 based on Defendant’s facial challenge.

### 5 **As Applied Challenge**

6 Defendant further argues that, even if § 922(g)(1) is not facially  
7 unconstitutional, it is unconstitutional as applied to him, because (1) he is one of  
8 “the people” protected by the Second Amendment; (2) the Second Amendment  
9 applies to possession of firearms; (3) and the Government is unable to justify  
10 applying § 922(g)(1) to Defendant by demonstrating that it is consistent with the  
11 “Nation’s historical tradition of firearm regulation.” ECF No. 42 at 12–14.  
12 Defendant contends that, for § 922(g)(1) to be valid, the Government must show that  
13 there is “a historical tradition of individuals with [Defendant]’s history receiving a  
14 lifetime ban of firearm possession.” *Id.* at 13. Defendant argues that his underlying  
15 convictions from Oregon, which were originally felonies but have been reduced to  
16 misdemeanors, “are arguably the weakest and least offensive” type of felony, and  
17 that the Government has failed to show a historical analogue of “disarming those  
18 convicted of minor felonies that were eligible to be reduced to misdemeanors.” ECF  
19 No. 49 at 5.

20 The Government responds that the vast weight of authority, particularly in the  
21 Ninth Circuit, has rejected as applied challenges. ECF No. 47 at 23. The

1 Government further notes that although Defendant could have reduced his prior  
2 convictions to misdemeanors, he did not, and he was therefore a convicted felon at  
3 the time that he was charged with being a Felon in Possession of a Firearm. *Id.* at 4.  
4 The Court agrees with the Government that § 922(g)(1) is applicable and  
5 constitutional as applied to Defendant, who was a convicted felon at the time that he  
6 was charged with the instant offense regardless of whether his predicate convictions  
7 were later to converted to misdemeanor convictions.

8 Ninth Circuit caselaw continues to uphold Ninth Circuit precedent finding §  
9 922(g)(1) constitutional as applied. *See, e.g., Hill*, 629 F. Supp. 3d 1027. Therefore,  
10 this Court is bound by existing Ninth Circuit precedent to uphold the  
11 constitutionality of § 922(g)(1) as applied to Defendant.

12 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to  
13 Dismiss, **ECF No. 42**, is **DENIED**.

14 **IT IS SO ORDERED.** The District Court Clerk is directed to file this Order  
15 and provide copies to counsel.

16 **DATED** this December 7, 2023.

17 s/ Rosanna Malouf Peterson  
18 ROSANNA MALOUF PETERSON  
19 Senior United States District Judge  
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